

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **F. S. & GS SERVICES, INC.,**)
4) **PCHB NO. 92-127**
5 **Appellant,**)
6)
7 **v.**) **FINAL FINDINGS OF FACT,**
8) **CONCLUSIONS OF LAW**
9 **NORTHWEST AIR POLLUTION)** **AND ORDER**
10 **AUTHORITY,**)
11)
12 **Respondent.**)
13)
14 _____

15 This case involves F. S. & GS Services, Inc. (F.S. & GS) appeal of Northwest Air
16 Pollution Authority's issuance of Notice of Imposition of Penalty (\$250) following a Notice of
17 Violation No. 2151 issued April 30, 1992 for alleged violations of asbestos handling
18 regulations.

19 A formal hearing was held Friday, May 21, 1993 at the Board's office in Lacey, WA.
20 Board Members present were Chairman Harold S. Zimmerman, presiding; Attorney Member
21 Robert V. Jensen; and Richard C. Kelley. Appellant F. S. & GS Services was represented by
22 Jon Havelock, construction manager. Respondent NWAPA was represented by David Blake,
23 Senior Asbestos and Environmental Specialist. Kim Otis, court reporter of Gene Barker &
24 Associates, Olympia, recorded the proceedings. Sworn testimony was heard. Exhibits were
25 admitted and examined. Oral argument was made. Having considered the memoranda
26 submitted and having reviewed the files herein, the Board makes these

27 **FINAL FINDINGS OF FACT,**
28 **CONCLUSIONS OF LAW AND ORDER**
29 **PCHB NO. 92-127**

40 CFR 61.150 *Failure to seal all asbestos-containing materials in leak-tight containers while wet.*

V

VI

VII

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
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- 1 1. Double wall and floor the enclosure.
- 2
- 3 2. Scrape asbestos containing material and let it fall to the floor.
- 4
- 5 3 Take down inner wall and floor and wrap around the debris and bag it.

6 VIII

7 Blake said that normal work procedure would involve scraping and collecting ACM in
8 pre-labeled, 6 mil asbestos bags, then passing the "dirty" or contaminated bag through a waste
9 load out, to the clean side to a waiting worker holding a clean bag, into which the dirty bag
10 would be placed while wet, thus double-bagging.

11 IX

12 Mr. Havelock started in asbestos work in 1987. He has an EPA competency card, and
13 is certified as supervisor in Kansas, Oregon and Washington. He has been approved AHERA
14 (Asbestos Hazardous Emergency Response Act) project certified designer, and taken a 40-hour
15 hazardous material course.

16 X

17 Mr. Havelock contends that three samples were taken in the regulated work area, and
18 two were taken in previously worked parts of the school. He claimed that air monitoring data
19 posted and shown to Inspector Blake show the asbestos-containing data was below EPA
20 recommended standards for airborne contaminants of .01 fibers per cubic centimeter. The
21 worker Mr. Blake saw was working in the hallway in what Mr. Havelock said was a regulated
22 work area doing industry-standard clean up of post-abatement activities. The area was safe
23 according to EPA standards for occupancy Mr. Havelock said.

24 XI

25 Laboratory analysis of the samples were not done according the National Emission
26 Standards for Hazardous Air Pollutants (NESHAP) Section 4. However if asbestos content is

1 at less than 10% as determined by a method other than point counting by polarized light
2 microscopy (PLM), verify the asbestos content by point counting using PLM. 40 CFR
3 161.141.
4

5 XII

6 There is a cost difference between the method of point counting analysis at
7 approximately \$120 per sample, and visual estimating at \$10 to \$25 per sample. Of the two
8 samples outside the work area, one was not detected as having asbestos, and the other was
9 estimated at 5% chrysotile asbestos. The laboratory report did not indicate that it was point
10 counted.

11 XIII

12 F.S. & GS challenges NWAPA's application of their regulations to the work place of
13 the asbestos contractor, and they challenge the application of NESHAP regulations to them.
14 The regulations deal with sealing of asbestos-containing materials in leak-tight containers , and
15 with collecting asbestos materials for disposal at the end of each working day.

16 XIV

17 F S. & GS argues that Labor and Industries statutes and WAC's pre-empt the field of
18 regulation of asbestos handling in the workplace or work area, and that NWAPA regulations
19 apply only to the general public.

20 XV

21 Removal of the decontamination unit to the hallway involved moving the negative
22 pressure enclosure, built with duct tape, plastic, and wood. Design of enclosure and materials
23 are to keep asbestos from contaminating other portions of the school building. But with
24 plastics, and duct tape it's not foolproof in keeping asbestos from getting behind that plastic or
25 behind that duct tape. The side of the decontamination unit had white suspect material,

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
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1 sampled by Mr. Blake. The material got there when the worker was removing the respiratory
2 type C air line from the enclosure. The air lines were stuck in the side. The classroom door
3 is 3 feet wide. The "decon" unit is 3 feet wide. Air hoses were placed on the side of the
4 "decon" unit, leading into the enclosure, and they were sealed with tape. To remove items
5 from the enclosure, the employee wraps the hoses with a wet rag from the outside, when they
6 are pulled out.
7

8 XVI

9 Nowicki & Associates, school consultants on the asbestos abatement project, were on
10 site both before and after Mr. Blake's inspection but were not present during the inspection.
11 There were air samples taken by F. S. & GS, but not by Nowicki, who reviewed the figure
12 taken by F. S. & GS.

13 XVII

14 Air samples each day show that F. S. & GS was below .01 fibers per cc at the site.
15 Outside the work area, outside the decontaminated unit entrance for April 10 were also below
16 .01 fibers per cubic centimeter.

17 XVIII

18 Nowicki's job is to advise the school district for compliance on regulations, contract
19 documents and the firm did clearance monitoring required by AHERA.

20 XIX

21 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
22 From these Findings of Fact, the Board issues these:
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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
PCHB NO. 92-127

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CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the parties. Chapter 43.21B RCW. The case arises under NWAPA Regulations, Section 570, implementing the Washington Clean Air Act, Chapter 70.94 RCW.

NWAPA has the burden of proof

NWAPA regulations consider 1% asbestos as threshold for violation.

II

NWAPA regulations, Section 570 - Focuses on Removal and Encapsulation of Asbestos Material:

The Board of Directors of the Northwest Air Pollution Authority recognize that asbestos is a serious health hazard. Any asbestos fibers released into the air can be inhaled and can cause lung cancer, pleural mesothelioma, peritoneal mesothelioma or asbestosis. The Board has, therefore, determined that any asbestos emitted to the ambient air is air pollution. Because of the seriousness of the health hazard, the Board of Directors has adopted this regulation to control asbestos emissions from asbestos removal and encapsulation projects in order to protect the public health. In addition, the Board has adopted these regulations to coordinate with the EPA asbestos NESHAP, the OSHA asbestos regulation, the Washington Department of Labor and Industries asbestos regulations, the Washington Department of Ecology Dangerous Waste regulation, and the solid waste regulations of Skagit, Whatcom and Island Counties.

We conclude that NWAPA adopted this section because of a potential concern over the issue of preemption in the asbestos field.

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III

Preemption requires either legislative intent to preempt the field or a direct conflict between the state statute and local ordinance such that they cannot be reconciled. Kennedy v. Seattle, 94 Wn.2d 376, 617 P.2d 713 (1980).

Chapter 49.17 RCW, the Washington Industrial Safety and Health Act (WISHA) is addressed to working conditions. RCW 49.17.010.040. It gives the Department of Labor and Industries power to administer safety and health standards for employees in any workplace and permits such standards to be enforced by agencies only pursuant to an interagency agreement with Labor and Industries. RCW 49.17.270

However, WISHA does not, either expressly or by implication, occupy the entire field of regulation of what workers may be required to do. It does not, for example, replace the requirements for cleanliness and sanitation which must be followed by employees of restaurants for the protection of the health of the general public. NWAPA's asbestos work practices are regulations of this latter variety. They are directed to public health and safety generally and are not aimed at protection of the worker. This distinction, we conclude, demonstrates that WISHA does not render NWAPA's asbestos rules invalid because of preemptive intent.

Similarly, Chapter 49.26 RCW establishes a program for regulating practices on "asbestos projects," aimed at working conditions. From this statute we are again unable to infer a preemptive intent to bar concurrent regulation of asbestos removal and encapsulation projects in the interests of "ambient air" quality protection for the public at large.

Moreover, we have not been shown that compliance with NWAPA's asbestos program necessitates non-compliance with Labor and Industries' program for the workplace. The mere existence of additional requirements does not indicate a conflict. We take judicial notice, from

1 prior cases, that NWAPA's and Labor and Industries' inspections of asbestos removal are
2 often concurrent, with the inspectors assisting each other. Accordingly, we conclude that there
3 is room for concurrent jurisdiction in this area and that the air pollution agency's asbestos
4 regulations do not conflict with the cited statutes of the state. Interstate Industrial Mechanical
5 v. PSAPCA, PCHB 88-147 and 88-175
6

7 IV

8 We conclude that Section 570.823 was violated April 9, 1992 when asbestos containing
9 materials were found and taken as samples from the Island View Elementary School, and
10 under laboratory analysis reportedly contained over 1% chrysotile and therefore were not
11 sealed in leak-tight containers while wet.

12 V

13 We conclude that Section 570.622(C)(2) was violated April 9, 1992 when some
14 asbestos materials stripped or removed the previous working day were not collected for
15 disposal at the end of that working day

16 VI

17 We conclude that NWAPA has not proven that F. S. & GS violated NESHAP 40 CFR
18 §61.150(a)(1)(iii), because it was not proven that the laboratory analysis of the samples were
19 done according to National Emission Standards for Hazardous Air Pollutants (NESHAP) as
20 required in 40 CFR §61.141.

21 VII

22 The purpose of civil penalties is to promote future compliance with the law, both by
23 these parties and the public at large. The reasonableness of penalties is based upon several
24 factors, including the scope of the violation and appellants' conduct.

25
26 FINAL FINDINGS OF FACT,
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1 We conclude that F. S. & GS' lack of prior violations of NWAPA regulations and its
2 efforts to fully understand and comply with state and federal regulations makes appropriate the
3 penalty that was issued.
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5 VIII

6 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
7 From the foregoing, the Board issues this:
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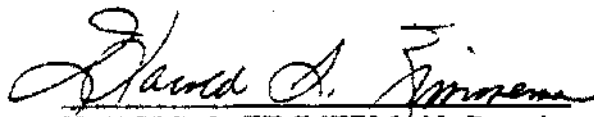
1
2 **ORDER**

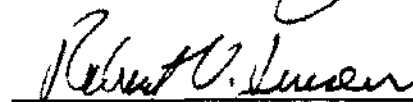
3 The Notice of Imposition of Penalty to F.S. & GS as to violations of NWAPA
4 regulations Section 570.823 and Section 570.622 are affirmed and of 40 CFR 61.150 is
5 reversed.

6 The \$250 penalty is affirmed.

7 DONE this 3rd day of June, 1993.

8 **POLLUTION CONTROL HEARINGS BOARD**

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10 
11 HAROLD S. ZIMMERMAN, Presiding

12 
13 ROBERT V. JENSEN, Attorney Member

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15 RICHARD C. KELLEY, Member
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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
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